Lum Choon Realty Sdn Bhd v Perwira Habib Bank (M) Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-862 OF 1998
SITI NORMA YAAKOB, AHMAD FAIRUZ AND DENIS ONG JJCA
30 MARCH 2000

Land Law *— Sale of land — Order for — Application to set aside — No opportunity to argue on reserve price due to failure to submit valuation report; whether sufficient to invalidate order for sale — New auction date fixed via issue of another Form 16H — Whether use of wrong form will affect validity of order made earlier — Whether first order for sale still valid*

Pursuant to an application for the sale of two plots of land charged by the appellant to the respondent, the land administrator granted an order under s 263 of the National Land Code 1965 ('the Code') and issued From 16H ('the first order'). The auction did not take place on the date fixed in the first order as the parties entered into negotiations for settlement. However no settlement was reached and the respondent applied to the land administrator to schedule a new auction date and to fix a new reserve price. At the meeting on 30 May 1997 at the office of the land administrator, the appellant sought to set aside the first order by applying to re-open the enquiry under s 34 of the Code. On 19 February 1998, the land administrator rejected the appellant's request to re-open the enquiry and allowed the respondent's application for a new auction date and a new reserve price. However he was not able to fix the auction date and reserve price on that date as he needed particulars of the land valuations from both parties. The land administrator adjourned the matter to enable both parties to submit valuation reports of the lands to him. The respondent submitted a valuation report to the land administrator but not the appellant. Following this, the land administrator issued another Form 16H ('the second order'). The appellant sought to have the second order set aside which the trial judge dismissed. The appellant appealed. It was submitted that: (i) the appellant were not given the opportunity to argue on the reserve price; and (ii) the second order was defective in that there was already a subsisting earlier order in the form of the first order.

Held, dismissing the appeal:

(1) The appellant had from the date when the valuation report was called for on 19 February 1998, when the second order was issued, a good three and a half months to do so but failed to submit any valuation report whilst the respondent had acted promptly by delivering one on 2 April 1998. As such the appellant could not complain for loss of opportunity to argue on the reserve price as such loss was occasioned by their own neglect or default (see p 150F–G).

(2) The circumstances leading to the second order stand on their own. The land administrator did not cancel the first order and did

not accede to the appellant's request to re-open the enquiry and hold a fresh one. All that he did was to fix a new auction date and a new reserve price, matters that were well within his powers and jurisdiction, but he committed the error of notifying both parties of such matters through the issue of another Form 16H (see p 152A–B).

(3) A letter would have sufficed to inform the parties of the new auction date and new reserve price. However, the use of a wrong form does not make it to be what it is, if an acceptable explanation is given as to the circumstances how the form was issued in the first place. In this instance, the land administrator did nothing to indicate that his first order was in any way invalid. What he did wrong and which did not affect the validity of the first order was to issue a second Form 16H. Since in reality he never made a second order for sale, nor cancelled the earlier one made through his first order, the second order, can never, on the face of Form 16H, be regarded as a second order for sale (see p 152C–E); *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 and *Perwira Affin Bank Bhd v Lim Weow* [1983] 3 MLJ 56 distinguished.

[Bahasa Malaysia summary

Selaras dengan satu permohonan untuk penjualan dua plot tanah yang telah digadaikan oleh perayu kepada responden, pentadbir tanah telah memberikan satu perintah di bawah s 263 Kanun Tanah Negara 1965 ('Kanun tersebut') dan mengeluarkan Borang 16H ('perintah pertama tersebut'). Perlelongan tersebut tidak berlaku pada tarikh yang telah ditetapkan dalam perintah pertama tersebut kerana pihak yang berkenaan telah memasuki perundingan-perundingan untuk mencapai penyelesaian. Walau bagaimanapun tiada penyelesaian yang telah dicapai dan responden memohon kepada pentadbir tanah tersebut supaya menjadualkan satu tarikh perlelongan yang baru dan menetapkan satu harga rizab yang baru. Di mesyuarat pada 30 Mei 1997 di pejabat pentadbir tanah tersebut, perayu cuba untuk mengetepikan perintah pertama tersebut dengan memohon untuk membuka semula siasatan di bawah s 34 Kanun tersebut. Pada 19 Februari 1998, pentadbir tanah tersebut telah menolak permintaan perayu untuk membuka semula sisatan itu dan membenarkan permohonan responden untuk mendapatkan satu tarikh perlelongan yang baru serta satu harga rizab yang baru. Walau bagaimanapun beliau tidak dapat menetapkan tarikh perlelongan itu serta harga rizab pada tarikh tersebut kerana beliau memerlukan butir-butir mengenai penilaian tanah daripada kedua-dua pihak. Pentadbir tanah tersebut telah menangguhkan perkara itu bagi membolehkan kedua-dua pihak mengemukakan laporan-laporan penilaian mengenai tanah-tanah tersebut kepada beliau. Responden telah mengemukakan laporan penilaian kepada pentadbir tanah tersebut tetapi perayu tidak melakukannya. Berikutan dengan ini, pentadbir tanah telah mengeluarkan satu lagi Borang 16H ('perintah

kedua tersebut'). Perayu telah berusaha untuk mengetepikan perintah kedua tersebut yang mana telah ditolak oleh hakim perbicaraan. Perayu merayu. Adalah dihujahkan bahawa: (i) perayu telah tidak diberi peluang untuk menghujah mengenai harga rizab tersebut; dan (ii) perintah kedua adalah tidak sempurna kerana telah pun terdapat perintah lebih awal yang berkuatkuasa dalam bentuk perintah yang pertama tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Perayu mempunyai, daripada tarikh bila mana laporan penilaian tersebut diminta pada 19 Februari 1998, ketika perintah kedua dikeluarkan, tempoh selama tiga bulan setengah yang memadai untuk melakukannya tetapi telah gagal untuk mengemukakan sebarang laporan penilaian sedangkan responden telah bertindak segera dengan mengemuakkan satu laporan penilaian pada 2 April 1998. Oleh yang demikian, perayu tidak boleh merungut kerana kehilangan peluang untuk berhujah atas harga rizab tersebut kerana kerugian yang sedemikian adalah disebabkan oleh kecuaian atau keingkaran mereka sendiri (lihat ms 150F–G).

(2) Keadaan yang membawa kepada perintah kedua tersebut kekal dengan sendirinya. Pentadbir tanah tidak membatalkan perintah pertama dan tidak bersetuju dengan permintaan perayu untuk membuka semula siasatan dan mengadakan suatu siasatan yang baru. Apa yang dilakukannya ialah menetapkan satu tarikh perlelongan yang baru berserta dengan harga rizab baru, perkara-perkara yang nyata terlingkung di dalam kuasa serta bidang kuasanya, tetapi beliau telah melakukan kesilapan dengan memberitahu kedua-dua pihak mengenai perkara-perkara yang sedemikian dengan mengeluarkan satu lagi Borang 16H (lihat ms 152A–B).

(3) Sepucuk surat sudah memadai untuk memaklumkan pihak-pihak tersebut mengenai tarikh perlelongan yang baru serta harga rizab yang baru. Walau bagaimanapun, penggunaan satu borang yang salah tidak menjadikannya apa yang seharusnya, jika satu penjelasan yang boleh diterima diberikan berhubung dengan keadaan bagaimana borang tersebut telah dikeluarkan pada mulanya. Dalam keadaan ini, pentadbir tanah tidak melakukan apa-apa untuk menunjukkan bahawa perintah pertama beliau adalah dalam sebarang keadaan tidak sah. Kesalahan yang beliau lakukan dan yang mana tidak menjejaskan kesahihan perintah pertama adalah mengeluarkan Borang 16H yang kedua. Oleh kerana pada hakikatnya beliau tidak pernah membuat perintah kedua untuk penjualan, mahupun membatalkan yang lebih awal yang telah dibuat melalui perintah pertama beliau, perintah kedua itu, tidak boleh, menurut Borang 16H, dianggap sebagai perintah kedua untuk penjualan (lihat ms 152C–E); *Eu Finance Bhd v Lim Yokje Foo* [1982] 2 MLJ 37 dan *Perwira Affin Bank Bhd v Lim Weow* [1983] 3 MLJ 56 dibeza.]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3030–3101.

Cases referred to

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 3 (distd)
Lim Yoke Foo v Eu Finance Bhd [1985] 1 MLJ 17 (refd)
Perwira Affin Bank Bhd v Lim Weow [1988] 3 MLJ 56 (distd)

Legislation referred to

National Land Code 1965 ss 34, 263, 418, Form 16H

Appeal from: Originating Motion No 25–73 of 1998 (High Court, Pulalu Pinang)

N Shanmugam (*Sahn & Gooi*) for the appellant.
YM Yoong (*WM Lee* with her) (*Shook Lin & Bok*) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): The proceedings in this appeal were first commenced in the Land Office at Penang. The land administrator had, pursuant to an application for the sale of two plots of land charged by the appellant to the respondent, held an enquiry and on 6 October 1997, granted an order for sale under s 263 of the National Land Code 1965 ('the Code') by the issue of Form 16H ('the first order'). Previous to this and between 1982 and 1983, the respondent had granted banking facilities totalling RM40m to the appellant and those facilities were in part secured by the charge of the two plots of land, the subject matter in the first order.

In the first order, the date for the public auction of the lands was fixed for 11 November 1987, at 10.00 am but the auction did not take place as the parties entered into negotiations for settlement. No settlement was reached however and the respondent applied to the land administrator to schedule a new auction date and to fix a new reserve price.

The land administrator, called all parties to meet him at his office on 30 May 1997. It was at this meeting that the appellant sought to set aside the first order by applying to re-open the enquiry under s 34 of the Code. The land administrator heard arguments and submissions from both sides and adjourned the matter for decision.

On 19 February 1998, the land administrator rejected the appellant's request to re-open the enquiry and allowed the respondent's application for a new auction date and a new reserve price. However he was not able to fix the auction date and reserve price on that date as he needed particulars of the land valuations from both parties. The land administrator adjourned the matter to enable both parties to submit valuation reports of the lands to him. No appeal under s 418 of the Code was lodged by the appellant against the dismissal of their application to re-open the enquiry.

The respondent submitted a valuation report to the land administrator but not the appellant and following this, the land administrator issued another Form 16H dated 8 June 1998 ('the second order') ordering:

(1) the lands to be sold;

(2) the lands to be auctioned on 15 July 1978; and

(3) the reserve price at RM16.5m.

The second order was served on all parties and the appellant responded by sending out a letter dated 23 June 1998, to the land administrator stating that the public auction cannot take place as the Court of Appeal had in the meantime set aside an order for sale in respect of lands charged together with the same two plots by the appellant to the respondent.

In Civil Appeal No W–02–302–96, the Court of Appeal was dealing with the other lands charged by the appellant to the respondent as security for the same banking facilities. This fact is not disputed and as such the Court of Appeal's decision is not binding on the order for sale made by the land administrator, which dealt with different plots of land.

On 10 July 1998, the appellant filed an appeal against the second order by way of originating motion seeking to have the second order set aside on the grounds:

(1) that it is defective for non-compliance with the Code;

(2) that the amount due had been wrongly computed; and

(3) that there is a binding Court of Appeal decision setting aside the order for sale. We have already dealt with this ground and we say it is a non-issue.

Before us the appellant raised two issues. The first is that they were not given the opportunity to argue on the reserve price. This is not correct as on 19 February 1998, when the land administrator dismissed the appellant's request to re-open the enquiry, he had adjourned the hearing to await the valuation reports from both parties so that he would be in a better position to fix the reserve price. Learned counsel on both sides were present when that directive was given. The respondent submitted their valuation report to the land administrator but not the appellant. The appellant had from the date when the valuation report was called for on 19 February 1998, until 8 June 1998, when the second order was issued, a good three and a half months to do so but failed to submit any valuation report whilst the respondent acted promptly by delivering one on 21 April 1998. As such the appellant cannot complain for loss of opportunity to argue on the reserve price as such loss was occasioned by their own neglect or default.

The appellant's second objection was that the second order was defective in that there was already a subsisting earlier order in the form of the first order and for this objection relied on the authorities of: (1) *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 which was affirmed by the Privy Council in (2) *Lim Yoke Foo v Eu Finance Bhd* [1985] 1 MLJ 17, and (3) *Perwira Affin Bank Bhd v Lim Weow* [1988] 3 MLJ 56. Those authorities held that once an order for sale is made by the land administrator under s 263 of the Code, he becomes functus officio and he cannot make a subsequent order for sale under s 263. Any second order for sale is a nullity and is devoid of any effect.

The case of *Eu Finance* is distinguishable as in the first order for sale made by the collector of land revenue there was an error in the number of

lands sought to be sold. Only 12 out of 20 titles were identified. The collector acknowledged the error and purported to cancel the sale. Subsequently another collector purported to make and issue another order of sale, specifying the amount due to the appellant as the same as that stated in the first order but fixing a higher reserve price and scheduling all 20 titles. Abdoolcader J (as he then was), had this to say on the status and validity of the second order for sale at p 39:

> There is no power in the collector to cancel an order made under s 263 or the sale to be effected thereby. When the collector purported to cancel the first order on the respondent lodging an appeal against it, he was in effect postponing the sale, as he has only the power by virtue of the provisions of s 264(3) to postpone a sale ordered under s 263, and subject thereto an order of sale once made will have to be implemented in accordance with the provisions of s 265 ... .

On appeal, the Federal Court confirmed that the collector had no powers under the Code to cancel his own order for sale made under s 263(1). As such the earlier order remained on foot and the second order was '*no order at all within and for the purposes of s 263 and is a nullity and devoid of any effect*'. This reasoning was approved by the Privy Council which also found that '*an essential pre-requisite of an order for sale under s 263 is that there shall have been an application by the chargees for such an order in Form 16G. The 1979 order was preceded by no such application. Another essential is that the collector shall hold an enquiry pursuant to s 261. The 1979 order was precedes by no such enquiry. Only at the conclusion of such an enquiry has the collector jurisdiction under s 263 to order a sale. It inevitably follows that the collector had no right, as between the lender and the borrower, to make the 1979 order. His duty, and his only jurisdiction, was to make the appropriate arrangements for the auction sale directed by the 1976 order but postponed. The 1979 order was hopelessly bad as between the lender and the borrower.*' The 1979 order referred to in the report is the second order whilst the 1976 order is the first order.

In *Perwira Affin Bank*'s case we had the occasion to decide on a similar issue. The facts disclosed that the Bank applied for an order for sale from the land administrator, Kuala Lumpur, who held an enquiry and made an order for sale on 2 June 1981 ('the first order'). The auction was called off due to irregularities in the enquiry. The land administrator then commenced a fresh enquiry, made a new order for sale and fixed a new auction date ('the second order'). Subsequently the respondent received a notice from the land administrator informing her that a new enquiry date had been fixed. The respondent applied to preclude the Bank from proceeding with the sale on the ground that the second order was a nullity and that the Bank's claim to proceed with the sale under the first order was barred by limitation. The trial judge found that after the 2 June 1982, the land administrator was functus officio and the second order was invalid and the only valid order for sale was the first order, a finding that this court confirmed to have been correctly made.

In the instant appeal before us, can it be said that the second order rank similar in status to the second order made by the collector in *Eu Finance*'s case and the land administrator in *Perwira Affin Bank*'s case? We reply in

the negative as the circumstances leading to the second order stand on their own. Firstly the land administrator did not cancel the first order as was done by his predecessor in *Eu Finance*'s case. Secondly unlike what was done in *Perwira Affin Bank*'s case, the land administrator did not accede to the appellant's request to re-open the enquiry and hold a fresh one. All that he did was to fix a new auction date and a new reserve price, matters that were well within his powers and jurisdiction, but unwittingly, he committed the error of notifying both parties of such matters through the issue of another Form 16H, the statutory form issued under s 263 of the Code and which is headed 'Perintah Jualan atas Permintaan Pemegang Gadaian'. Since in reality, he never made a second order for sale, nor cancelled the earlier one made through his first order, we say that the second order, can never, on the face of Form 16H, be regarded as a second order for sale. As pointed out by the trial judge, the Land Office was not equipped with an appropriate form wherein directions for sale, can be notified to the parties. In this instance a letter would have sufficed to inform the parties of the new auction date and new reserve price. This was not done but instead the land administrator used Form 16H without deleting the offending words '*Dengan ini, pada menjalankan kuasa yang diberi oleh s 263 Kanun Tanah Negara, perintah supaya dijual tanah yang tersebut itu ...*', although he took pains to delete other words which he considered to be inappropriate.

Be that as it may, the use of a wrong form does not make it to be what it is, if an acceptable explanation is given as to the circumstances how the form was issued in the first place. In this instance, the land administrator did nothing to indicate that his first order was in any way invalid. What he did wrong and which we say did not affect the validity of the first order, was to issue a second Form 16H, when a letter would suffice to inform both parties of the new date of auction and the reserve price. The need to notify the parties of these matters became necessary as on 19 December 1998, when they were before him, the land administrator did not have particulars of the land valuations. If such particulars were available then, the land administrator would, in their very presence, inform both parties of the auction date and reserve price and he would not have made the error of issuing the second Form 16H.

On the facts of this appeal, we were in complete agreement with the findings of the learned trial judge that there cannot be read into the second order, any order for sale but that the second Form 16H merely informed the parties of the new auction date and reserve price. It could not have contained any other particulars as the land administrator did nothing more than to fix an auction date and a reserve price. Based on our findings, we had accordingly dismissed this appeal with costs and we ordered the deposit to be paid out to the respondent to account of their taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar